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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
AVR, L.P. d/b/a	)	
Hyperion of Tennessee, L.P.	)	
	)	
Petition for Preemption of	)	
Tennessee Code Annotated	)	CC Docket No. 98-92
§ 65-4-201(d) and Tennessee	)	
Regulatory Authority Decision	)	
Denying Hyperion's Application	)	
Requesting Authority to	)	
Provide Service in Tennessee	)	
Rural LEC Service Areas	)	

COMMENTS OF THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") pursuant to Public Notice DA 98-1115 (June 12, 1998), hereby files its comments in support of the petition for preemption filed by Hyperion of Tennessee, L.P.

For all the reasons cited in the petition, ALTS urges the Commission to act quickly in granting the requested relief. By insisting on enforcing a statute that clearly violates the Telecommunications Act, the Tennessee Regulatory Authority("TRA") has left the Commission with no option but to preempt the statute and the TRA orders enforcing it. With precedent nearly on all fours with this case, there frankly is no reason why the Commission should be faced with this petition more than two years after the passage of the Telecommunications Act of 1996. Thus,

the Commission should move quickly and decisively so that there will no longer be any dispute as to the validity of any state statute that acts as a flat prohibition on the provision of competitive services.

At the risk of repeating what has been so convincingly articulated in the petition, ALTS believes that a few salient points need to be emphasized. The Tennessee statute at issue, Section 65-4-201(d), provides that the certificate of convenience and necessity, which is a prerequisite to the provision of telecommunications services in Tennessee, will not be granted with respect to

> "areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines unless the [incumbent] voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless the incumbent . . . applies for a certificate to provide telecommunications services in an area outside its service area . . . ."

The Tennessee statute is thus in direct conflict with Section 253(a) of the federal Telecommunications Act of 1996 which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" must be preempted pursuant to paragraph (d) of Section 253 which provides that "[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal

requirement that violates subsection (a) . . . the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation."[1]

Despite paragraphs (a) and (d) of Section 254, the TRA has enforced Section 65-4-201(d) against Hyperion based upon its belief that paragraph (b) of Section 253 provides an "exception" to paragraph (a) and (d). Paragraph (b) provides that

> [n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Relying on this section the TRA denied Hyperion's application to provide service in areas covered by a telephone company with fewer than 100,000 access lines. Despite having before it Federal Communications Commission cases that found that outright prohibitions against the provision of competitive services must be preempted under paragraph (d) of Section 253, the Tennessee Commission found that "[a]t this early stage of the development of the interpretation of Section 253(a) . . . the Authority has determined that it would be premature to capitulate" and found that the Tennessee provision may stand

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[1] Unlike some preemption cases, there is simply no question in this case as to the authority of the Commission to preempt. Paragraph (d) of Section 253 requires the Commission to preempt any state action in violation of either paragraph (a) or (b).

because the Authority believed that the statute protects universal service.

As noted in the petition, the Commission has previously preempted a statute very similar to, but in many ways less restrictive than, the Tennessee statute. See In the Matter of Silver Star Telephone Co., Inc., FCC 97-336 (Sept. 24 1996). In Silver Star the Commission clearly held that any flat prohibition on the provision of service could not be upheld, even if passed with the purported intent to encourage universal service goals.[2] The Silver Star case discussed at length the relationship between paragraphs (a) and (b) of Section 253 and clearly stands for the proposition that a flat prohibition on the provision of service by one type of carrier can never be considered "competitively neutral" for the purposes of paragraph (b).[3]

In any event, the justification of the Tennessee Regulatory Authority in upholding the statute rings very hollow. Neither Section 65-4-201(d) nor its legislative history even mentions

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[2] The Commission found that "section 253(a) at the very least proscribes State and local . . . requirements that prohibit all but one entity from providing telecommunications services . . . ." Id. at ¶ 38. The Commission, quoting the Classic Telephone case, In re Classic Telephone, Inc., CCB Pol 96-10, FCC 96-397 (rel. Oct. 1, 1996) stated that "'Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry.'" Id. at ¶ 42.

[3] The statute does not say "competitively neutral with respect to non-ILEC carriers" which is in essence how the TRA reads the statute.

universal service as a reason for denying competitive provision of service. The discussion of universal service goals as the reason for adoption of Section 65-4-201(d) comes only from the TRA ex post facto.

The Tennessee statute at issue in this case is also significantly more restrictive than the Wyoming statute or a Texas statute that the Commission also previously preempted.[4] In addition to the fact that the Tennessee statute prohibits competition in many more areas than either of the other statutes (due to a 100,000 versus the 30,000 and 31,000 line exemption in the Wyoming and Texas statutes) unlike the Wyoming and Texas statutes the Tennessee statute has no time limitation. The Tennessee statute is a flat prohibition[5] on the provision of service, while the Wyoming and Texas statutes were prohibitions for a period of years. Thus, the Tennessee Regulatory Authority's justification of the statue as preserving "for a period of time universal service" is inaccurate.[6] In Tennessee

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[4] See In re Public UtilitY Commission of Texas et al., CCB Pol 96-13 (rel. Oct. 1, 1997).

[5] Apparently, another section of the Tennessee Code requires the General Assembly to review the statute every two years, but that is absolutely no guarantee that Section 65-4-201(d) will ever terminate or be amended.

[6] Likewise the statements by the TRA in its order denying Hyperion's application to provide service in Tennessee Telephone's Service territory that "The general assembly concluded that prematurely opening up the more rural areas of the state to competition without some transition period could result

(continued...)

there is no indication or guarantee that competitive providers will ever be allowed into many markets in Tennessee regardless of the status of Universal Service or the other principles listed in paragraph (b) of Section 253.[7]

CONCLUSION

The Commission should expeditiously preempt Tennessee Code Section 65-4-201(d) and the TRA order enforcing the statute, Docket No. 98-0001 (TRA April 9, 1998) as violative of section 253(a) of the Telecommunications Act of 1996.

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[6](...continued)
in untold consequences that may have substantial harmful effects on universal service in said areas" (emphasis added) and that the legislature pass 65-4-20(d) "[i]n order to ensure that rural consumers receive both the benefits of the development of an efficient technologically advanced statewide system of telecommunications and universal service during the introductory stages of competition in this previously monopolistic market" (emphasis added) ring hallow when the statutory provision is unlimited in time.

[7] The fact that a competitor may be able to provide service if the incumbent agrees is irrelevant. Not only is it unlikely that the incumbent will agree, but the ability to provide service can never be dependent upon the decision of the monopoly competitor.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 1998, copies of the foregoing Comments of the Association for Local Telecommunications Services were served via first class mail, postage prepaid, or by hand as indicated to the parties listed below.

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